EDMUND CHARLES LIEBENBERG

v.

ICB-GRIFFIN MANUFACTURING SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[PETITION NO: D4-26-2-1998]
1 APRIL 2005

COMPANY LAW: *Members' rights - Oppression - Onus upon petitioner - Companies Act 1965, s. 181*

COMPANY LAW: *Members' rights - Oppression - Nature of - Companies Act 1965, s. 181*

COMPANY LAW: *Separate legal entity - Veil of incorporation - Instances when such veil may be lifted*

COMPANY LAW: *Directors - Shadow director - Whether a director under Companies Act 1965, s. 4 - Liability of*

This consolidated action arose from two petitions filed under s. 181 of the Companies Act 1965 ('the Act') by the Australian petitioner. The first petition was brought against ICB-Griffin Manufacturing Sdn Bhd ('Manufacturing'), its directors, Instantgreen Corporation Bhd ('Instantgreen') and ICB-Machineries Sdn Bhd ('Machineries'). The second petition was brought against ICB-Griffin Marketing Sdn Bhd ('Marketing'), its directors, Instantgreen and Machineries. The directors of Manufacturing were the also the directors of Marketing. The majority shares (51%) in Manufacturing and Marketing were held by Machineries – a subsidiary of Instantgreen – a KLSE listed public company. By shareholders' agreements dated 8 November 1996, entered into by the petitioner and Machineries, the petitioner was to acquire 49% equity in both Manufacturing and Marketing. The agreements also required the petitioner to be involved in the conduct and management of both Manufacturing and Marketing as Managing Director. He was allowed to appoint two Directors into the Board of Directors of both companies. The petitioner also entered into an employment contract with Manufacturing wherein he was to be employed as its Managing Director at its factory in Bentong. The petitioner complained of the following acts of oppression: (i) he was denied access to the petty cash and the operating budget of the companies (Manufacturing and Marketing) and not made a signatory to the companies' bank accounts; (ii) Machineries, acting

on the order of Instantgreen, caused the petitioner's shares to be transferred to him only in late July 1997 and his share certificates were only physically handed over to him in early August 1997; (iii) the appointment of the petitioner and his nominee directors in the two companies were made only after the petitioner had served notice of intention to sell his shares; (iv) before the shares could be allotted and the petitioner and his nominees be appointed directors, the 4th, 5th, 6th, and 9th respondents on 10 June 1997 in bad faith and without the knowledge of the petitioner proceeded to appoint the 5th respondent to the Board of Directors of Manufacturing, Marketing and Machineries; (v) the 4th, 5th, 6th and 9th respondents obtained a loan of RM2.5 million for Manufacturing and another RM2.5 million for Marketing without the knowledge nor consent of the petitioner, the respondents knowing that the loans were not intended for the benefit of the two companies and that neither of the companies was in a position to repay their respective loan; and (vi) there was an attempt to dispose of the retained right of the petitioner. The petitioner thus sought an order to compel the respondents to buy his shares in Manufacturing and Marketing pursuant to s. 181(2) of the Act.

Held (allowing the petition with costs):

[1] The petitioner had to establish that the affairs of Manufacturing and Marketing were being conducted, or that the powers of the directors were being exercised in an oppressive manner or in disregard of his interests, or that some unfairly discriminatory or prejudicial act of the company had been done to his prejudice. (p 625 f)

[2] Denying the petitioner his right to the shares without excuse constituted a conduct 'departing from standards of fair dealing and a violation of conditions of fair play'. In the instant case, the facts clearly indicated that the intention was to prevent the petitioner from partaking in the management of the company until the act of obtaining large loans could be performed and achieved. The loans were used not for the benefit of the companies but for other companies in which the petitioner had no interest in. The oppression was thus absolute. The affairs of the companies were being conducted in an oppressive manner or in disregard of the petitioner's interests. The directors of the two companies, the 4th, 5th, 6th and 9th respondents were guilty of oppression of the petitioner on the complaints advanced. (p 626 d-f)

[3] The 10th respondent was a 'person in accordance with whose directions or instructions the directors of a corporation are accustomed to act'. He was thus under s. 4 of the Act a director of both the companies. He was in effect a 'shadow' director. The 10th respondent therefore had to be made jointly and severally responsible for the acts of the other directors in so far as they affected the petitioner as a shareholder. (pp 627 g & 628 b)

[4] Manufacturing and Marketing were fronts for Instantgreen. Their directors and Machineries were all alter egos of Instantgreen. There was no difficulty in lifting the corporate veil of Manufacturing and Marketing to impute the liability of their directors onto their holding company Instantgreen. The acts of Instantgreen were sufficient to justify the lifting of the corporate veil to make Instantgreen and its subsidiary Machineries liable in their corporate capacity for the oppression of their directors upon the petitioner. (pp 629 b, 633 d, 634 h & 635 a)

Case(s) referred to:

Adams & Ors v. Cape Industries plc & Anor [1991] 1 All ER 929 ***(refd)***

Ata Management Consultants Sdn Bhd v. Makmuran Sdn Bhd [2004] 3 CLJ 53 CA ***(refd)***

Bank of Montreal v. Canadian Westgrowth Ltd [1990] 72 Alta LR (2d) 319 ***(refd)***

Dimbleby & Sons Ltd v. National Union of Journalist [1984] 1 WLR 427 ***(refd)***

Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 ***(refd)***

In re Cumana Ltd [1986] BCLC 430 ***(refd)***

People's Insurance Co (M) Sdn Bhd v. People's Insurance Co Ltd & Ors ***(refd)***

Re Keytech International plc [1999] 2 BCLC 324 ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd [1978] 2 MLJ 227 ***(refd)***

Scottish Co-operative Wholesale Society Ltd v. Meyer [1959] AC 324 ***(refd)***

Tengku Abdullah Ibni Sultan Abu Bakar v. Mohd Latiff Shah Mohd [1997] 2 CLJ 607 CA ***(refd)***

Woolfson & Anor v. Strathclyde Regional Council [1978] SLT 159 ***(refd)***

Yeo Hung Khiang v. Dickson Investment (Singapore) Pt Ltd & Ors [1999] 2 SLR 129 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 4, 181(2)

Other source(s) referred to:

Mayson, French & Ryan, *Company Law*, 15th edn, pp 158 & 159

Gower, Principles of Modern Company Law, 3rd edn, p 213

Loh Siew Chiang & William MF Wong, *Company Law: Powers and Accountability*, p 39

Walter Woon, *Company Law*, 2nd edn, 1997, p 52

For the petitioner - Anantham Kasinather; M/s Skrine & Co
For the 1st & 3rd respondents - Hazalina Haron; M/s Rahman Too & Co
For the 2nd, 4th & 9th respondents - Sunther Thulasi (Rajpal Singh with him); M/s Zahari & Rakan-rakan)
For the 5th & 6th respondents - David Mathews; M/s Mathews Hun Kandiah

Reported by Andrew Christopher Simon

JUDGMENT

Kang Hwee Gee J:

The Petitions

The two petitions, D4-26-2-1998 and D5-26-3-1998 were consolidated.

They were based on similar complaints and were for similar relief under s. 181 of the Companies Act 1965.

The petition D4-2-1998 was directed to the directors of ICB-Griffin Manufacturing Sdn Bhd the 1st respondent; and the petition in D5-26-3-1998 to the directors of ICB-Griffin Marketing Sdn Bhd (the 1st respondent).

The directors of ICB-Griffin Manufacturing Sdn Bhd were also the directors of ICB-Griffin Marketing Sdn Bhd.

The complaints in the respective petition were in respect of the same acts of oppression by the common directors of the two related companies ICB-Griffin Manufacturing Sdn Bhd (the 1st respondent in D4-26-2-1998) and ICB-Griffin Marketing Sdn Bhd (1st respondent in D5-26-3-1998) which the petitioner claimed were committed against him at the behest of the directors of Instantgreen Corporation Bhd (the 2nd respondent) and ICB-Machineries Sdn Bhd (the 3rd respondent).

The earlier part of the proceedings was conducted before His Lordship Steve Shim J (as he then was before his elevation as Chief Justice East Malaysia), before whom the parties had agreed from the outset that all the deponents of the affidavits in these petitions be subject to cross-examination.

Originally the petitioner had sought a number of declarations of his right with such ancillary prayers that would have been quite regular in an action begun by writ but not in a petition under s. 181 of the Companies Act 1965. In the end however, they were distilled down to a petition for an order to compel the respondents to buy over his shares in the two companies pursuant to s. 181(2) of the Act.

The petitions against the 7th and 8th directors in both the petitions were withdrawn by the petitioner in the course of the proceedings and were accordingly struck out in the course of the proceedings.

About The Petitioner

The petitioner, Edmund Charles Liebenberg, an Australian national, is currently a registered shareholder of both the companies ICB-Griffin Manufacturing Sdn Bhd and ICB-Griffin Marketing Sdn Bhd, the 1st respondent in the respective petition.

ICB-Griffin Manufacturing and ICB-Griffin Marketing each has an authorized share capital of RM100,000 divided into 100,000 shares of RM1 each, of which 100 ordinary shares have been issued and credited as fully paid up.

The petitioner currently holds 49 ordinary shares in each of the two companies. The remaining 51 ordinary shares in each company are held by ICB-Griffin Machineries, a subsidiary of Instantgreen Corporation Berhad, a public company listed on the KLSE.

In The Beginning

The petitioner owned the technology relating to the design, configuration and manufacture of motorcycles which he produced at his Adelaide plant. The motorcycles were marketed in Australia and Japan.

Sometime in the middle of 1996 the 2nd respondent Instantgreen Corporation Bhd was desirous of acquiring from the petitioner the technology and the machineries used for the manufacture of the motorcycles at the Adelaide plant with a view of moving the entire production over to Malaysia.

It sent a delegation consisting of Leong Lean Pong (the 4th respondent), Yip Yee Foo (6th respondent) and Tam Eam Thong (the 10th respondent) over to Adelaide to negotiate with the petitioner.

Both the 4th and the 6th respondents were directors of Instantgreen Corporation Bhd.

The 10th respondent however was not on record as a director or shareholder in any of the companies but was by the contention of the petitioner a shadow director of Instantgreen Corporation Bhd.

The components used in the manufacture of the motorcycles including the engines were not proprietary as such but were sourced from other established original equipment manufacturers from which the petitioner was able to produce a line of Harley Davidson class motorcycles called the Griffin Legends.

The petitioner's assets were therefore to be found essentially in the technology relating to the design, configuration and production of the Griffin Legend which was stored in a computer disk and described in the shareholders' agreement infra, as the Intellectual Property (IP), and to a lesser extent in the machineries used to manufacture of the motorcycles located at the petitioner's factory at Adelaide, South Australia.

The Australian firm of valuer, Messrs. Leadenhall Australia Ltd valued the petitioner's Griffin Legend Motorcycles manufacturing business at A$9.7 million.

Following negotiations the petitioner agreed to sell his Intellectual Property at a much lesser sum of A$2.0 million and the machineries at A$300,000 provided he was to be given a 49% equity paid for in full by the Instantgreen (2nd defendant) in each of the two related companies to be formed later for the purpose of manufacturing and marketing the motorcycles in Malaysia.

The agreement would in effect make the petitioner a 49-51 joint venture partner of Instantgreen Corporation Bhd to manufacture and market the Legend Motorcycles in Malaysia.

To undertake its joint-venture with the petitioner, Instantgreen Corporation Bhd then set up its own subsidiary IGB-Machineries to execute the requisite agreements with the petitioner and to hold its interests in the two companies, ICB-Griffin Manufacturing Sdn Bhd and ICB-Griffin Marketing Sdn Bhd. which were to be formed later for the purpose of the joint venture.

On 8 November 1996 the petitioner entered into two agreements as follows:

1. Sale of Machineries Agreement

By this agreement the petitioner sold all the retrievable machines used in the manufacturing the motorcycles in his Adelaide factory to ICB-Griffin Manufacturing Sdn Bhd for the sum of A$300,000.

The consideration was paid to the petitioner by Instantgreen Corporation Bhd.

2. Technology Acquisition Agreement

By this agreement the petitioner sold all his ownership in the technical information and industrial intellectual property relating to the production manufacturing and marketing of the Legend motorcycles in Malaysia and the Pacific Rim region to ICB-Griffin Marketing Sdn Bhd for the sum of $A2.0 Million. The consideration was paid to the petitioner by Instantgeeen Corporation Bhd.

The petitioner retained the right to manufacture and market the Legend Motorcycles outside Malaysia and the Pacific Rim region, but gave Instantgreen the option to purchase this residual right for a further consideration of AU$1 Million at any time in the future.

The machineries were subsequently dismantled and relocated to the new factory at Bentong, Pahang Malaysia where the production of the motorcycles were set to begin.

The Shareholders' Agreements

To protect his interests in the two joint venture companies in Malaysia on the same date the petitioner entered into two other shareholders' agreements with Machineries, that is to say:

(i) the IGB-Griffin Shareholders Manufacturing Agreement and

(ii) the ICB-Griffin Shareholders Marketing Agreement.

Employment As Managing Director Of Igb-griffin Marketing

In addition on the same date the petitioner also entered into a Contract of Employment Agreement with ICB-Griffin Manufacturing wherein the petitioner was employed as the Managing Director of ICB-Griffin Manufacturing at the company's factory at Bentong, Pahang commencing on 1 December 1996 and ending 30 November 1998.

The appointment gave the petitioner a free hand to manage the factory to produce the motorcycles at the said factory. The scope of his duties and powers as Managing Director is spelt out in cl. 2(a) of the Contract of Employment as follows:

> The Employee shall in his capacity as MANAGING DIRECTOR faithfully, diligently and to the best of his ability exercise all and any such powers and duties in relation to the business of the Company as shall be assigned to or vested in him or which the Company or its authorised representative shall from time to time assign to or vest in him and do all in his power and use his best skills and endeavours to promote develop and expand the business further in the Company's interest upon such terms as the Company shall direct in writing.

His duties and functions were set out in cl. 2(e) of the agreement to include but not limited to the following:

1. Determine strategies and budgets in respect of financial, marketing and sales, productions, after-sales service, administration and research and development for the Company and submit relevant reports to the Chief Executive Officer and Board of Directors;

2. Upon receipt of approval and/or directives from the Board of Directors, manage all aspects of the company and its resources towards attaining specified objective. Be responsible for the employment and/or termination of employment of all employees (other than Directors and senior management) of the company, subject to employment regulations and company policies and procedures;

3. Establish, implement and maintain an on-going programme to work within Governmental policies and company policies towards increasing local content for the manufacture and/or supply of components and/or services including after sales services, in the production, marketing, sales of the company's products and operations of the company;

4. Establish, implement and maintain methods of monitoring international market trends, new products and competition with regard to all the company's current and potential products;

5. Establish, implement and maintain both national and international images for the Company's products and services.

The ICB-Griffin Manufacturing Shareholders Agreement And The Icb-Griffin Marketing

Shareholders Agreement

Both the two shareholders agreements were inter-related and contained similar provisions.

The relevant provisions in the ICB-Griffin Manufacturing Shareholders Agreement and the ICB-Griffin Marketing Agreement which form the basis of the petitioner's complaints in the petitions may be summarised as follows:

a) ICB-Machineries agreed that it shall cause ICB-Griffin Manufacturing and ICB-Griffin Marketing to issue to the petitioner the respective 49% of the issued share capital of ICB-Griffin Manufacturing and ICB-Griffin Marketing which shall be credited as fully paid. ICB-Machineries shall hold the remaining 51% equity in the respective company. (para. (C) of the preamble).

b) ICB-Machineries shall co-operate with the Petitioner in the running of the business of ICB-Griffin Manufacturing and ICB-Griffin Marketing and shall employ the petitioner as Managing Director to conduct the operating and management of both the companies and to implement the policies, rules, decision and directions of the shareholders and the Board of Directors. (cl. 4.1).

c) The petitioner shall have the right to appoint 2 directors onto the Board of Directors, whilst ICB-Machineries shall have the right to appoint 5 directors in respect of each of the companies. (cl. 2.2).

d) The respective shareholders' agreements provides (cl. 2.7) that:

2.7 Unless all the directors shall agree otherwise not less than fourteen (14) clear days notice of every meeting of the Board of Directors shall be given to each director and where such director has an alternate, to such alternate also and at such meetings:

2.7.1. Five (5) directors, including at least (3) nominees of ICB-Machineries and a nominee of the petitioner present in person or by their duly appointed alternate, shall form the quorum for meeting of the Board of Directors of the company.

2.7.2. In the absence of a quorum at any meeting of the directors, the meeting will be adjourned fourteen (14) days to the same time and at the same place and at such adjourned meeting any two (2) directors present of which at lease one (1) shall be the nominee of ICB-Machineries shall constitute a quorum and may subject to cl. 3 hereof proceed to meet and dispose of maattters presented before the Board.

e) Clause 3 of the respective shareholders agreement provides that:

3.1 … notwithstanding any other relevant provisions herein contained the Board of Directors of the company shall not pass any resolution in respect of any of the following matters unless the passing of such resolution shall be by no less than 6 directors and notice of such resolution has been given to all the directors in accordance with any relevant provisions of the Articles of Association of the company:

3.1.1. Any proposal to be put to the shareholders in general meeting concerning:

(i) any alteration to or amendment of the Memorandum and Articles of Association of the company;

(ii) the reconstruction consolidation merger or amalgamation or the engagement in a partnership or joint venture of the company with any other company, firm, person or persons;

(iii) the dissolution of the company except on the grounds of insolvency;

(iv) the declaration of any dividend and the appropriation of any surplus funds;

(v) any alteration of the authorised share capital or cancellation of any part thereof or the issue of any shares or consolidation or subdivision of any shares or alteration of any of the rights attached to any of the issued shares or the reduction of the share capital or repayment of any amount standing to the credit of any share premium account or capital redemption reserve fund or payment of any shares by way of bonus from such account or fund or the entering into any arrangement whatsoever granting rights by way of option or otherwise to subscribe for or acquire any other rights in respect of any part of the issued or unissued share capital of the company from time to time;

3.1.2 To sell, transfer or assign or otherwise dispose of (whether by means of one transaction or a series of transactions related or not and whether at one time or over a period of time) the whole or any material part of the Company's undertaking or of its assets except in carrying out normal investment or other transactions in the ordinary course of business of the Company;

3.1.3 To enter into or give or permit or suffer to subsist any guarantee, and/or pledges and/or debenture for the due payment of any money or performance of any contract, engagement or obligation by the Company or by any person firm or company or provide any credit to any other person, firm or company.

3.1.4 Any increase or reduction in the number of Directors and the appointment or removal of the Company's auditors; and

3.1.5 The approval of transfers of shares in the Company.

3.2 Save as otherwise required by the Companies Act 1965 or by the provisions herein, all matters at meetings of directors or members of the Company shall be decided by a majority of votes.

The Binding Effect Of The 5 Agreements

All the five agreements were conditional upon and subject to one another and were intended to form a single cohesive transaction.

The Parties

For ease of reference the 1st respondent ICB-Griffin Marketing Sdn Bhd and ICB-Griffin Manufacturing Sdn Bhd will henceforth be referred to respectively as "Manufacturing" and "Marketing".

The 2nd respondent (a public company listed on the KLSE) will be referred to as "Instantgreen".

The 3rd respondent ICB Machineries Sdn Bhd will be referred to as "Machineries".

The 4th, 5th , 6th , 9th and 10th respondents being natural persons will be referred to respectively as "Leong", "Tai", "Yip", "Koay" and "Tan".

Except for Tan all the other respondents were on the record as directors of Instantgreen, Manufacturing, Marketing, and Machineries at all relevant times.

The 10th respondent Tan, it was alleged, had an indirect and secret interest in Instantgreen and through Machineries had controlled both Manufacturing and Marketing, although his name did not appear in the books of any of these companies.

The Complaints

These were set out in detail in the two petitions and may be summarized as follows:

1. The factory at Bentong was set up in early 1997 and went into trial production under the management of the petitioner and an Australian nominee he had appointed. It was able two produce a few motorcycles but the petitioner was excluded from the management of the Manufacturing and Marketing, contrary to what had been agreed under the contract of employment read with the he shareholders' agreement he entered into with Manufacturing. The companies were in fact being run and managed by the nominee directors of Instantgeen. He was denied access to the petty cash and the operating budget of the companies and was not made a signatory to the companies' bank accounts. Instantgreen and or its subsidiary ICB-Machineries had taken upon itself to deal directly with the suppliers of Machineries and Marketing but failed to pay them.

2. Under the shareholders' agreements the petitioner was entitled to be allotted 49% of the ordinary shares in Marketing and Manufacturing and to be appointed director together with one other person nominated by him in both the companies by 8/11/1996 or at the latest by 21/12/1996. The shares had pursuant to the Shareholders Agreements been first allotted to Machineries in November 1996 and credited as fully paid in the name of Machineries. In breach of the agreements, Machineries acting on the order of Instantgreen caused the shares to be transferred to the petitioner only in late July 1997 and the share certificates only physically handed over to the Petitioner in early August 1997. The appointment of the Petitioner and his nominee as directors in the two companies were made only after the Petitioner had served notice of intention to sell his shares due to the acts of oppression and breach of fiduciary duty of the respondent directors.

   The petitioner contended that the respondent's explanation that the delay was due to having to wait for the Ministry of Finance's Foreign Investment Committee (FIC) to approve the application for the petitioner and his nominee to be made directors was, devoid of merit as clearly no such approval was necessary. Secondly, it was contended that even if the FIC approval was necessary, there was no reason why the shares could not have been transferred immediately after 11.4.1997.

3. Before the shares could be allotted and the petitioner and his nominee be appointed directors of Manufacturing and Marketing, the 4th, 5th, 6th, and 9th respondents on 10.6.1997 in bad faith and without the knowledge of the petitioner proceeded to appoint 5th respondent to the Board of Directors of Manufacturing and Marketing and Machineries.

4. The 4th, 5th , 6th and 9th respondents then proceeded to obtain a loan of RM2.5 million for Manufacturing and another RM2.5 million for Marketing from Oriental Bank Bhd, at Wisma SHL, Jalan Tun Perak branch, without the knowledge nor the consent of the petitioner. The total loan sums of RM5 million were then used to pay off the expenses and debts of Instantgreen and its other subsidiaries. The respondents knew that the loans were not intended for the benefit of the two companies and that neither of the companies was in a position to repay the loan. The directors were therefore acting in breach of their fiduciary duty to the two companies and in the process adversely affecting the interest of the petitioner as minority shareholder. The petitioner contended that had he and his nominee been allotted the shares and appointed directors in the two companies, (Manufacturing and Marketing) as agreed, they would not have voted to take the RM5 million for the benefit of companies in the Instantgreen group of which the petitioner had absolutely no interests in.

5. The collective acts of the of 4th , 5th , 6th and 9th respondents in taking the RM5 million loan rendered both Manufacturing and Marketing insolvent. Their inability to pay the rental of the factory at Bentong where the motorcycles were to be manufactured caused the landlord to seize the factory and to auction off all the assembled 22 motorcycles recovering from them a nominal sum of RM110,000 when according to the petitioner, each completed motorcycle alone was worth A$28,000 to A$30,000.

6. Further, as a separate issue it was contended that sometime in July 1997, in breach of the Technology Acquisition Agreement, Leong, purporting to negotiate for Manufacturing attempted to dispose of the petitioner's retained right with respect to the manufacture and marketing of the Legend motorcycles outside Malaysia and the Pacific Rim region to a company called K.S. Enterprise Ltd of Canada – this despite the fact that Instantgreen had not exercised the option to purchase the right from the petitioner by paying the further consideration of AU$ 1 million as agreed.

'Oppression Or Disregard' Under s. 181

A member or a debenture holder of a company is entitled to petition under s. 181 where:

(i) the affairs of the company are being conducted or the powers of the directors are being exercised in an oppressive manner or in disregard of his interests, or

(ii) some unfairly discriminatory or prejudicial act of the company has been done or threatened, or that some resolutions of the members, debenture holders or any class of them has been passed or is proposed to be passed.

As a shareholder of the two companies the petitioner must establish his cause within the ambit of s. 181 of the Act and in the context of complaints advanced in his petitions. He has to establish that the affairs of the two companies were being conducted or that the powers of the directors are being exercised in an oppressive manner or in disregard of his interests, or that some unfairly discriminatory or prejudicial act of the company has been done to his prejudice.

'Disregard of interests' had been expressed in the leading case of *Re Kong Thai Sawmill (Miri) Sdn Bhd.* [1978] 2 MLJ 227 to mean 'unfair disregard'. 'Oppression' in essence means an 'unfairly prejudicial conduct' that is to say, a conduct "departing from standards of fair dealing and a violation of conditions of fair play". Four broad class of conduct were envisaged that would justify judicial remedy under s. 181. These were oppressive conduct, conduct in disregard of interests, unfairly discriminatory conduct or prejudicial conduct.

Culpability Of 4th, 5th, 6th And 9th Respondents

That the 4th respondent Leong, the 5th respondent Tan, the 6th respondent Yip and the 9th respondent Koay were directors of the two companies Manufacturing and Marketing and at the same time they were directors of Instantgreen and Machineries was not in dispute.

They admitted that they had voted in their capacity as directors of the 1st respondent company to obtain the RM5 million loan and that they were familiar or ought to be familiar with the shareholders agreement spelling out the right of the petitioner and the obligation of Instantgreen.

They also admitted knowing that the loan was not intended for the 1st respondent but for the use of Instantgreen and its other subsidiaries, and that in all likelihood the loan could never be repaid and that eventually this would cause the destruction of the company and with it the interest of the petitioner.

In denying the petitioner his right to the shares without excuse by itself constitutes a conduct "departing from standards of fair dealing and a violation of conditions of fair play" as envisaged in *Re Khong Thai*, *supra*; and where as in the instant case the facts clearly indicate that the intention was to prevent the petitioner from partaking in the management of the company until the act of obtaining a large loan could be performed and achieved; and that the loan was used not for the benefit of the companies but for other companies in which the petitioner had no interest in, the oppression was absolute.

I have no difficulty therefore in finding that the affairs of the companies were being conducted in an oppressive manner or in disregard of the petitioner's interests and that the directors of the two companies the 4th, 5th, 6th and 9th respondents were guilty of oppression of the petitioner on the complaints advanced.

But that is not the end of the matter.

The 10th respondent Tan, counsel for the petitioner Mr. Anantham contended, was in fact a shadow director of Manufacturing and Marketing and must therefore share the same liability with the other directors of the two companies – this notwithstanding that he was not declared to be one in any of their books.

Secondly, it was contended that the 4th, 5th, 6th and 9th respondents was the alter ego of Instantgreen and therefore their acts were in fact and in law the acts of Instantgreen.

The question that must now be considered under the circumstances is first, whether the oppression could be imputed onto Tan the 10th respondent. Next it would be necessary to consider whether the oppression could be imputed on to Instantgreen.

The first involves a purely straight forward process of interpreting 'director' under s. 4 of the Act.

The second however involves a more complex assessment of the conduct of Instantgreen by the actions of its directors to determine whether the veil of incorporation could be lifted against the company.

Imputing The Oppression On Tan

Section 4 of the Act defines a director as follows:

> "director" includes any person occupying the position of a director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director;

It must be appreciated that Tan was not in any of the books a director of any of the companies. In order to find the respondent Tan liable for the oppression or disregard complained of it is first necessary to establish that he was a director of both the companies within the meaning of s. 4 of the Act, that is to say "a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act".

The 10th respondent Tan was contented to leave the petitioner's complaints against him unchallenged, having been absent and unrepresented at the later part of the proceedings without leave. One would therefore have to accept as established in the absence of any rebuttal evidence that he was instrumental in securing the agreements with the petitioner by the clear evidence of his participation in the negotiation together with Leong the 4th respondent and Yip the 6th respondent in Adelaide and that subsequent to the two companies being formed in Malaysia, he appointed and instructed the staff of Instantgreen and had control over their directors including Leong and Tai.

Accordingly I must so find that he was a "person in accordance with whose directions or instructions the directors of a corporation are accustomed to act" and must be regarded under s. 4 of the Act as a director of both the companies. I would go further to say that he was in effect a 'shadow director' more aptly described in *Re Keytech International plc* [1999] 2 BCLC 324 as:

a person who through directions and instructions, exercises real influence over some, if not all, of the affairs of the company through directors constituting the majority on the board who are accustomed to act upon those directions and instructions. He often lurks in the shadows, but it is not a necessary ingredient that he must lurk in the shadows all the time. If he decides to be in the sun occasionally, that does not make him any less a shadow director.

Having found that he was a shadow director under s. 4 of the Act, it follows that the 10th respondent Tan must join the rank of the other sitting directors that he controlled in Manufacturing and Marketing and be made jointly and severally responsible for their acts in so far as they affect the petitioner as a shareholder.

Culpability Of 2nd Respondent Instantgreen - Lifting The Veil Of Incorporation

Manufacturing and Marketing, according to Mr. Anantham, were collectively the alter ego of Instantgreen by its subsidiary, Machineries which was therefore also its alter ego. He submitted that the court should lift the veil of incorporation of these companies to make Instantgreen liable for the harm done to the petitioner. All the evidence, he submitted, points irrefutably to the fact that:

(i) Instantgreen – a body corporate was in fact the real purchaser of the Intellectual Property and Marketing Rights of the petitioner. Right from the start negotiations were conducted in the name of Instantgreen by its own Chief Executive Officer Yip Yee Foo. The letter of acceptance of the petitioner's offer was written by Instantgreen and the payment of purchase price for the both the Intellectual Property and Marketing Rights was made by Instantgreen - and it was also Instantgreen that provided the guarantee for payment of purchase price.

(ii) Instantgreen was in absolute control of the affairs of the two joint venture companies Manufacturing and Marketing through its subsidiary Machineries, (the 3rd respondent) and all the companies share the same common directors.

(iii) All major decisions and resolutions made by all Instantgreen subsidiaries including Manufacturing and Machineries had to be approved by Instantgreen.

(iv) The Technology Acquisition Agreement of the Intellectual Property provides that the two companies incorporated to pursue the joint venture companies (Manufacturing & Marketing) between the petitioner and Instantgreen would be nominees of Instantgreen.

(v) All financial decisions were made by a team under the financial controller of Instantgreen and were all made in the interests of Instantgreen and the decision to take the RM5 million was a decision of Instantgreen.

On the facts as established, I would accept the submission that Manufacturing and Marketing were fronts for Instantgreen and therefore their directors as well as the 3nd respondent company Machineries, were all alter egos of Instantgreen much as Clark Kent was to Superman.

In fact counsel for the 2nd, 4th and 9th respondents Mr. Sunther (submitting for all the respondents) himself did not dispute the substance of Mr. Anantham's submission, preferring instead to direct his argument to the purely jurisprudential question of whether Instantgreen should be made liable for the acts of the directors of its subsidiaries Manufacturing and Marketing given that under the doctrine of corporate personality they were separate corporate entities and should not be treated as one and the same person. He relied on the judgment of Zakaria Yatim J (as he then was) in *People's Insurance Co. (M) Sdn. Bhd. v. People's Insurance Co. Ltd & Ors* [1986] 1 MLJ 68 wherein it was held that:

(1) the parent (holding) and subsidiary companies are two separate legal entities;

(2) officers of the parent company who are on the Board of the subsidiary are not representatives of the parent company but sit at the Board meeting as directors and agent of the subsidiary;

(3) a resolution of the Board of Directors of the subsidiary does not bind the parent company. The resolution did not constitute a contract between the parties.

The principle of lifting of the veil of incorporation, he submitted, had not yet found its place in law and it was at most uncertain whether it can be applied against the holding company in respect of the acts of its subsidiary as Lord Diplock said in *Dimbleby & Sons Ltd v. National Union of Journalists* [1984] 1 WLR 427 at p. 435:

> The 'corporate veil' in the case of companies incorporated under the Companies Act is drawn by statute and it can be pierced by some other statute if such other statute so provides; but, in view of its raison d'etre and its consistent recognition by the courts since *Salomon v. A. Salomon & Co. Ltd* [1897] AC 22, one would expect that any parliamentary intention to pierce the corporate veil would be expressed in clear and unequivocal language. I do not wholly exclude the possibility that even in the absence of express words stating that

> in specified circumstances one company, although separately incorporated, is to be treated as sharing the same legal personality of another, a purposive construction of the statute may nevertheless lead inexorably to the conclusion that such must have been the intention of Parliament.

The view of Lord Diplock in the *Dimbleby* case, he said had found support in the 15th edn of *Mayson, French & Ryan on Company Law*, wherein at pp. 158 &159 (Bundle of Authority A at p. 304) it is stated that:

> It is a feature of company law that it permits a group of companies to be arranged so as to separate liabilities for the various activities of the group. The unlikelihood of a court ever overriding such an arrangement and transferring liability from a company which incurred it to a company more able to meet it.

The Canadian case of *Bank of Montreal v. Canadian Westgrowth Ltd* [1990] 72 Alta LR (2d) 319 was cited by the learned authors of the book in support. In that case the plaintiff sought to make a parent company liable on a contract entered into by its wholly owned subsidiary, on the ground that:

> (a) the officers and directors of the two companies were identical and meetings of their two boards were held concurrently;
>
> (b) the subsidiary was funded entirely by the parent and its assets were purchased with money loaned by the parent interest free and with no terms of repayment;
>
> (c) the audits for both companies were performed by the same auditor and they had identical financial years;
>
> (d) most of the dealings and correspondence concerning the contract were with the parent's personnel and correspondence concerning the contract were with the parent's personnel and correspondence was on the parent's headed paper; (e) the parent provided management services to the subsidiary without cost.

Brennan J of the Canadian court found, at p. 327 that:

> In my view the facts relied upon by the plaintiff to support its argument for a piercing of the corporate veil do not justify a finding that (parent and subsidiary) were one and the same and that (the parent) was the *de facto* contracting party, being the alter ego of the subsidiary … it is my view that the facts relied upon by the plaintiff in support thereof are nothing more than one would expect to find in the operation of two associate companies, and in particular where, as here, the parent provided management services for the subsidiary.

I have no difficulty in accepting that well established facet of company law that a company incorporated under the Companies Act 1965 enjoys a separate and distinct personality from its members and directors. The doctrine of corporate personality as it is called had been set on firm footing by House of Lords in *Solomon v. Solomon and Company Limited* [1897] AC 22 as it was, most emphatically in the following passage of the speech of Lord Macnaughten:

> The company is at law a different person altogether from the subscribers to the memorandum; and, although it may be that after incorporation the business is the same as before, and the same persons are managers; and the same hands received the profits, the company is not in law the agent of the subscribers or the trustee for them. Nor are the scribers as members liable in any shape or form, except to the extent and in the manner provided by the Act.

But the doctrine is not inviolable – for an inflexible application of the doctrine would allow a party to hide behind the corporate facade to escape liability from acts he would otherwise have been liable personally.

The lifting of the veil of incorporation is not applied on any definite legal basis as such but on the broad criteria of "where the justice of the case warrants". To quote Walter Woon the learned author of *Company Law*, 2nd edn, the courts are "primarily concerned with doing justice in the cases before them rather than in developing a coherent doctrine as to when the separate personality of a company may be disregarded."

Here in our jurisdiction, the principle seems to have been first applied with some degree of certainty in *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109.

In that case several workers of the *Jaya Puri Chinese Garden Restaurant Sdn Bhd* were retrenched when the restaurant closed down. The company was a wholly-owned subsidiary of *Hotel Jayapuri Bhd* on whose premise the restaurant was situated. It was found as a fact that although technically the restaurant and the hotel were separate legal entities, in reality the two companies were functionally one such that an employee of the restaurant was in reality an employee of the hotel. This was what Salleh Abas, FJ (sitting as a High Court Judge) said:

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the Court has, in a number of cases, by-passed this principle if not made an inroad into it. The Court seems quite willing to lift "the veil of incorporation" (so the expression goes) when the justice of the case so demands.

Thus the facts of the case may well justify the Court to hold that despite separate existence a subsidiary company is an agent of the parent company or *vice versa* as was decided in *Smith, Stone and Knight v. Birmingham Co.;* [1938] 4 All ER 116Re FG (Films) Ltd. [1955] 1 WLR 483 and *Firestone Tyre & Rubber Co. v. Llewlyn* [1957] 1 WLR 464.

The following tract from the 3rd edn of *Gower: Principles of Modern Company Law*, at p. 213 was approved and relied upon by the court:

> The Courts are coming to recognise the essential unity of a group enterprise rather than the separate legal entity of each company within the group. Other examples of this can be found in *The Roberta* [1937] 58 Ll LR 159, a parent company was held liable on a bill of lading signed on behalf of its wholly owned subsidiary, the Court saying that the subsidiary was 'a separate entity ... in name alone and probably for the purposes of taxation'. In another case, *Spittle v. Thames Grit & Aggregates Ltd.* [1937] 4 All ER 101, the Court found no difficulty in treating the subsidiary as 'to all intents and purposes' the same as the parent company which held 900 of its shares. A licensing authority in exercise of its discretion has been held entitled to have regard to the fact that a parent and subsidiary company, though technically separate legal persons, in fact constituted a single commercial unit (*Merchandise Transport Ltd. v. British Transport Commission* [1962] 2 QB 173, Devlin LJ at p. 202) ... A good example of this is *Bird & Co. v. Thos Cook & Son* [1937] 2 All ER 227, in which an indorsement of a cheque to 'Thos Cook & Son Ltd.' was treated as an indorsement to the allied but separate company of Thos Cook & Son (Bankers) Ltd. by regarding it as a mere misdescription to be ignored under the principle *falsa demonstratio non nocet.*

The *Jaya Puri* case was followed by the Court of Appeal in *Tengku Abdullah ibini Sultan Abu Bakar v. Mohd Latiff bin Shah Mohd.* [1997] 2 CLJ 607 where Gopal Sri Ram JCA found "a sufficient factual foundation which in justice, warrants the piercing of Allied corporate veil" to find the appellant liable, having found as a fact that the appellants had exercised undue influence in procuring a club to enter into an agreement depriving it of its assets with Allied a company in which the appellant had control of to the detriment of its members.

In the more recent case of *Ata Management Consultants Sdn Bhd v. Makmuran Sdn Bhd* [2004] 3 CLJ 53 however, the same judge of the Court of Appeal appears to have rejected the liberal approach of lifting the veil "where the justice of the case so demand" in favour of placing more sanctity on corporate personality having been influenced it would appear, by the English Court of Appeal in *Adams & Others v. Cape Industries PLC & Another* [1991] 1 All ER 929 wherein Slade LJ re-affirmed the strict application of the Salomon doctrine in the following passage at 1026:

> We do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.

But the doctrine remained intact. The Court of Appeal it would appear had merely placed a limit on the power of the court to lift the corporate veil in all cases it thought fit, approving as it did, the observation of Lord Keith of the House of Lords in *Woolfson and Another v. Strathclyde Regional Council* [1978] SLT 159 that:

> any departure from a strict observance of the principles laid down in *Salomon v. Salomon & Co Ltd* [1897] AC 22 has been made to deal with special circumstances when a limited company might well be a facade concealing the true facts.

On my part, I do not see any difficulty in lifting the corporate veil of Manufacturing and Marketing to impute the liability of their directors onto their holding company Instantgreen.

Firstly, contrary to what Lord Diplock had perceived in the *Dimbleby* case, *supra*, there could be no intrusion into the principle of corporate personality in statutory company law as such – as the lifting of the veil is founded purely on the raison d'etre that the impugned act was not the act of the company but of another entity who should not be allowed to seek refuge under the corporate veil of that company. As Walter Woon postulated in his book, *Company Law* (2nd edn 1997) at 52:

> The only justification for lifting the veil of incorporation is that in fact the company is not a separate entity. This requires evidence. If the evidence does not establish that the company is run as a mere extension of its controllers' affairs, the veil of incorporation should remain firmly in place. However if it can be proven that the company is in fact not a separate entity from its controllers, a court might be persuaded to lift the veil in the appropriate circumstances.

Secondly, when courts do intervene they only do so where it is overly clear on the facts that the holding company was not making use of the subsidiary as a legitimate trading arm, but as "a facade concealing the true facts" of its activities. Where its purpose is not legitimate, the holding company is no different from any non corporate person. As Lord Keith of the House of Lords

in *Woolfson and Another v. Strathclyde Regional Council* [1978] SLT 159 (in a passage approved by Gopal Sri Ram JCA in *Ata Management, supra*) observed, that:

> any departure from a strict observance of the principles laid down in *Salomon v. Salomon & Co Ltd* [1897] AC 22 has been made to deal with special circumstances when a limited company might well be a facade concealing the true facts.

Needless to say, the doctrine is now well established. But if a *raison d'entre* is required, I would respectfully adopt the view expressed by the learned authors of *Company Law: Powers and Accountability*, Loh Siew Chiang & William M.F. Wong in the following passage of their book at p. 39:

> The essential guiding principle is, perhaps, that the corporate veil can only be lifted if on the facts of the case, after taking into account all the surrounding circumstances and the proper context of the case, the corporate form is not used to achieve the intended `functions' of an incorporated company as set out in s. 16(2) of the Ordinance. This is because the primary function of an incorporated company as intended by the legislature is to achieve limited liability by separating the legal personality of shareholders from that of the incorporated company so that the former will not own the business or property of the latter or be responsible for the debts of a company. This primary function intended by the legislature and to be performed by an incorporated company constitutes the legislative purpose on the part of the legislature in allowing the creation of an incorporated company under the Ordinance. Consequently, in cases where it is objectively ascertainable that the beneficiaries of the statutory concept seek to abuse the underlying purpose of the doctrine of separate legal entity so as to defeat public convenience, justify wrong, protect fraud or defend crime or to serve a purpose which is foreign to the legislative purpose they should not be allowed to escape liability by hiding behind the corporate entity.

Had Manufacturing and Marketing been used purely as subsidiaries to further the legitimate commercial interest of Instantgreen, these would have come squarely within the factual matrix of the Bank of Montreal case referred to by Mr. Sunther – in which case there could be no cause to lift the corporate veil to make Instantgreen liable for the acts of the directors of Manufacturing and Marketing.

But Instantantgreen went beyond the bounds of legitimacy to deliberately delay the allotment of the shares and deny the petitioner the right to the two seats on the Board of each of the companies thereby effectively keeping him out from their management; and later to use the companies which they were in full control of, to obtain large loans for itself, the effect of which was to destroy the subsidiaries and consequently all the petitioner's interest therein.

These were acts which undermined the underlying legislative purpose of providing a company with an independent corporate personality – sufficient in my view, to justify the lifting of the corporate veil to make the 2nd respondent Instantgreen and its subsidiary ICB Machineries liable in their corporate capacity for the oppression of their directors upon the petitioner.

The Remedy

Under 181(2) of the Act, an oppressed shareholder or debenture holder is afforded a remedy "with the view to bringing to an end or remedying the matters complained of" in which case the court may "make such order as it thinks fit".

A restrictive construction of the subsection would therefore appear to exclude the power of the court to grant compensatory damages as it would in a claim in contract or in tort. Nevertheless, it would be quite legitimate to include in any such remedy a 'compensatory element' calculated to afford the oppressed shareholder the proper worth of his interest in the company.

Thus the shares of a company may be valued at an earlier date to compensate for its fall in value as where a company had been deprived of its business at the time when it was valued (*Scottish Co-operative Wholesale Society Ltd v. Meyer* [1959] AC 324) or where there is a general fall in the market (*In re Cumana Ltd* [1986] BCLC 430). Where appropriate the compensatory element may also take the form of adding on a premium of 5% or so on their value at the time of assessment (see *Yeo Hung Khiang v. Dickson Investment (Singapore) Pt Ltd & Ors,* [1999] 2 SLR 129).

The Order

I would consider it fair and appropriate on the facts to make the 'purchase order' as proposed by Mr. Anantham to compel the 2nd, 3rd, 4th, 5th, 6th, 9th and 10th respondents to buy over on a joint and several basis all the petitioner's shares in both Manufacturing and Marketing.

The value of these shares are to be assessed at the point of time when the two companies were incorporated, by a qualified accountant the choice of which is to be agreed upon by the parties failing which the registrar shall be at liberty to appoint.

There shall be added to the value of such shares a premium of 10%. This is on account of the fact that had the joint venture been properly carried out in accordance with the agreements reached there is a high probability that they would have appreciated in value by now.

The petitioner shall be entitled to costs.